

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

APR 29 2010

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2009-0198
)	DEPARTMENT A
Appellee,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
MARSHALL EARL THOMPSON II,)	the Supreme Court
)	
Appellant.)	
_____)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20083265

Honorable John S. Leonardo, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
By Kent E. Cattani and Jonathan Bass

Tucson
Attorneys for Appellee

Robert J. Hirsh, Pima County Public Defender
By David J. Euchner

Tucson
Attorneys for Appellant

H O W A R D, Chief Judge.

¶1 After a jury trial, appellant Marshall Thompson II was convicted of two counts of aggravated assault. He was sentenced to presumptive, concurrent terms of

imprisonment, the longer of which was ten years. On appeal, Thompson claims the trial court erred in denying his motion to continue his trial in order to retain private counsel. For the following reasons, we affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to sustaining the convictions. *State v. Guerra*, 161 Ariz. 289, 293, 778 P.2d 1185, 1189 (1989). After Thompson was arrested and indicted, attorney Jack Lansdale was appointed to represent him. Several months later, Lansdale moved to withdraw, claiming Thompson had informed him that he no longer wanted Lansdale to represent him and also asserting Thompson had filed a state bar complaint against him. The trial court granted Lansdale's motion and appointed a new attorney, Dawn Priestman, to represent Thompson.

¶3 Because she had been appointed less than two weeks before Thompson's trial was scheduled to begin, Priestman moved to continue the trial. The trial court granted the motion and set a new trial date for approximately two and one-half months later. The day before the new trial date, however, Thompson informed the court that he again wished to continue the trial in order to replace Priestman with privately retained counsel. Thompson indicated, however, that he had not yet hired a private attorney but had merely spoken with an attorney who had informed him that "there is nothing he can do [on the case] without an extension" of the trial date.

¶4 In response to Thompson's motion, the state noted it had been "trying to contact witnesses the last few days [and had been] really trying to get everybody together and in order" to begin the trial. After confirming that Priestman was ready to proceed

with the trial, and noting that Thompson’s case had been “on . . . track” to proceed to trial “for some time,” the trial court denied Thompson’s motion. Thompson appeals from this ruling.

Discussion

¶5 Thompson contends the trial court committed “structural error” by denying his request for a continuance in order to replace Priestman with a private attorney. We will not disturb a trial court’s denial of a motion to continue trial for the purpose of substituting counsel “absent a clear abuse of discretion.” *State v. Hein*, 138 Ariz. 360, 368, 674 P.2d 1358, 1366 (1983). To the extent that the trial court’s denial involved an issue of law, however, we review it de novo. *State v. Aragon*, 221 Ariz. 88, ¶ 4, 210 P.3d 1259, 1261 (App. 2009).

¶6 A defendant who can afford to retain private counsel generally may choose the attorney who will represent him. *See United States v. Gonzalez-Lopez*, 548 U.S. 140, 144 (2006). Wrongful denial of that right results in error, “regardless of the quality of the representation [the defendant] received.” *Id.* at 148. A defendant’s “right [to choose counsel], however, is not absolute.” *State v. Coghill*, 216 Ariz. 578, ¶ 40, 169 P.3d 942, 952 (App. 2007). “A trial court has ‘wide latitude in balancing the right to counsel of choice against the needs of fairness, and against the demands of its calendar.’” *Aragon*, 221 Ariz. 88, ¶ 5, 210 P.3d at 1261, *quoting Gonzalez-Lopez*, 548 U.S. at 152. Whether the trial court errs in denying a defendant’s request for a continuance to substitute private counsel depends on the circumstances of the particular case. *Id.* Among the factors we consider on review are

whether other continuances were [previously] granted; whether the defendant had other competent counsel prepared to try the case; the convenience or inconvenience to the litigants, counsel, witnesses, and the court; the length of the requested delay; the complexity of the case; and whether the requested delay was for legitimate reasons or was merely dilatory.

Id., quoting *Hein*, 138 Ariz. at 369, 574 P.2d at 1367.

¶7 Here, Thompson had already been granted one continuance shortly before an earlier trial date when he had sought to change counsel due to conflicts with his first attorney. The trial court noted that Thompson waited to request a second continuance until the “eve of trial” and observed that Thompson’s current counsel had been competently representing him and was ready to proceed to trial. The court also stated that Thompson appeared to be seeking the continuance in order to obtain a favorable plea offer. And Thompson himself acknowledged he had not yet hired new counsel and the private attorney he wished to hire would not be ready to proceed with trial on schedule. Additionally, the state noted that it had been preparing its witnesses for trial on the scheduled date, and Thompson admits as much with respect to the victim. Under the circumstances, the trial court did not err in denying Thompson’s motion.

¶8 Citing *Aragon*, however, Thompson notes that the trial court did not inquire as to when the private attorney might be ready to proceed to trial in the case and states that the ““onus is [sic] on the court to create a record of its reasons for the denial.”” But the present record amply supports the court’s denial of the motion. And in any event, the record supports the inference that the court did indeed consider how long new counsel would need to prepare. As we explained above, Thompson himself stated that the lawyer

he wished to hire could do “nothing [on the case] . . . without an extension.” And the first time Thompson was given an extension to change attorneys, it took nearly three months for the newly appointed lawyer to be ready for trial. Thus, the trial court did not err in denying Thompson’s motion.

Disposition

¶9 In light of the foregoing, we affirm Thompson’s convictions and sentences.

/s/ *Joseph W. Howard*

JOSEPH W. HOWARD, Chief Judge

CONCURRING:

/s/ *Philip G. Espinosa*

PHILIP G. ESPINOSA, Presiding Judge

/s/ *Virginia C. Kelly*

VIRGINIA C. KELLY, Judge